IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THOMAS IBSEN and JANN IBSEN, husband and wife,	)	**No. 23782-6-III**
Appellants,	)	
v.	)	
FRED KUHLMAN and JANE DOE KUHLMAN, husband and wife, and the marital community composed thereof dba CLASSIC BUILDERS, and GULF INSURANCE COMPANY,	)	
Defendants.	)	
NIK QAFOKU and ODETA QAFOKU, husband and wife,	)	**Division Three**
Respondents,	)	
v.	)	
FRED KUHLMAN and JANE DOE KUHLMAN, individually and the marital community comprised thereof, if any, d.b.a. CLASSIC BUILDERS, and GULF INSURANCE COMPANY, a Surety Bond No. B-34229579, WESTERN MATERIALS, INC., a Washington corporation, and CENTRAL PRE-MIX CONCRETE CO., a Washington corporation,	)	**UNPUBLISHED OPINION**
Defendants.	)	
BUDDY KELSER and CHERYLYN KELSER, husband and wife,	)	

SCHULTHEIS, A.C.J. — A trial court ordered a pro rata distribution of bond proceeds among three second-tier creditors after a contractor filed bankruptcy. Only one creditor obtained a judgment before the bankruptcy stay. This appeal requires us to determine whether the priority provision of the contractor's bond statute, RCW 18.27.040, requires creditors to have a judgment in order to satisfy their claims with bond proceeds. We conclude that it does not and affirm.

FACTS

This case involves the priority of claims brought by Thomas and Jann Ibsen, Nik and Odeta Qafoku, and Buddy and Cherylyn Kelser against Fred Kuhlman doing business as Classic Builders (the builder) and Gulf Insurance Company (the bonding company).

The Ibsens filed suit against the builder and the bonding company on December 18, 2003. On January 13, 2004, the Ibsens obtained a default judgment in the amount of $5,000 in actual damages, $10,000 in treble damages under the Consumer Protection Act (CPA), chapter 19.86 RCW, and costs and attorney fees in the amount of $1,410 for a total of $16,410.[1]

On January 13, 2004, the Qafokus sued for a principal judgment against the

[1] Western Materials, Inc., a materialman third-tier creditor obtained a judgment on January 8, 2004, in the amount of $13,129.38 in actual damages and $2,040.46 in interest, costs, and attorney fees. It is not a party to this appeal due to its lower priority status and the limited funds available. *See* RCW 18.27.040(4).

builder and the bonding company in the principal amount of $12,180, attorney fees and costs of $1,200, prejudgment interest, damages under the CPA, and "such other and additional relief as the Court shall deem just and equitable in the premises." Clerk's Papers (CP) at 146. On January 20, the Kelsers similarly filed suit for a principal judgment under their contract, attorney fees, damages under the CPA, and "any additional or further relief which the court finds equitable, appropriate or just." CP at 166.

The builder filed for bankruptcy on January 20, 2004, before the Qafokus or the Kelsers could obtain judgments. Neither the Qafokus nor the Kelsers made an effort to stay the bankruptcy proceedings.

On March 4, the bonding company tendered the full amount of its bond into the registry of the court and was dismissed from further liability with respect to the builder. The Qafokus moved to consolidate the cases and distribute the bond on a pro rata basis. The court granted the motion and entered findings of fact, conclusions of law, and an order directing that the bond proceeds be distributed on a pro rata basis as proven by judgment or by sworn declaration.[2] The Ibsens appeal.

DISCUSSION

The Ibsens challenge the trial court's order directing distribution of the bond

[2] The Ibsens mention some presentment problems that delayed the disposition. But they did not assign error to these difficulties as procedural defects, and these problems do not affect the outcome.

proceeds on a pro rata basis among second-tier creditors. They assert that RCW 18.27.040 and WAC 296-200A-090 require that creditors have judgments in order to collect bond proceeds.

The trial court's ruling concerns statutory interpretation, which is a matter of law that we review de novo. *Philippides v. Bernard*, 151 Wn.2d 376, 383, 88 P.3d 939 (2004). "The court's fundamental objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). The determination of whether a plain meaning can be established includes an examination of the statutory scheme. *Id.*

Contractors must register with the State and post a bond. RCW 18.27.040(1). The registration process is administered through the Department of Labor and Industries. RCW 18.27.040. Any person with a claim against a bonded contractor may bring an action on the bond in superior court within one year from the date the labor is performed, materials and equipment are furnished, or the contract work is substantially completed or abandoned. RCW 18.27.040(3). RCW 18.27.040(4) allows the bonding company to notify the department and the parties, and tender to the superior court clerk "an amount equal to the claims thereunder or the amount of the bond less the amount of judgments, if

any, previously satisfied therefrom and to the extent of such tender the surety upon the bond shall be exonerated." "[B]ut if the actions commenced and pending at any one time exceed the amount of the bond then unimpaired," RCW 18.27.040(4) establishes a five-tier priority system for payment of those claims.[3] The priority provision plainly does not require that the claims be reduced to judgment. Additionally, the statute does not imply or express a first-in-time approach among claimants of equal priority.

"In lieu of the surety bond required by this section the contractor may file with the department a deposit consisting of cash or other security acceptable to the department." RCW 18.27.040(8). The department promulgated chapter 296-200A WAC to "clarify issues related to suits against contractors and the collection of court judgments." WAC 296-200A-005(2). But the administrative interpretation of RCW 18.27.040 does not apply to the judicial resolution of claims involving bond proceeds. *Ward v. LaMonico*, 47 Wn. App. 373, 376, 378, 735 P.2d 92 (1987). *See also Dep't of Revenue v. Nat'l Indem. Co.*, 45 Wn. App. 59, 62, 723 P.2d 1187 (1986) ("To the extent that [former] WAC 296-200-100(2) [(1982)] is inconsistent with RCW 18.27.040, the rule is invalid."). In *Ward*, a case neither party cites, Division One of this court refused to enforce an

[3] The tiers are: "(a) Employee labor and claims of laborers, including employee benefits; (b) Claims for breach of contract by a party to the construction contract; (c) Registered or licensed subcontractors, material, and equipment; (d) Taxes and contributions due the state of Washington; (e) Any court costs, interest, and attorney's [attorneys'] fees plaintiff may be entitled to recover." RCW 18.27.040(4).

administrative rule requiring a claimant to sue the contractor and the bonding company in one action. *Ward*, 47 Wn. App. at 376-79 (citing former WAC 296-200-090(3) (1981)). The *Ward* court agreed with the homeowners that "'security,' as used in RCW 18.27.040([11]), is a reference to 'the security held by the department' in RCW 18.27.040([9]), and therefore, the rulemaking authority granted to the Department of Labor and Industries does not extend to cases involving bonded contractors." *Id.* at 376.

In this case, the Ibsens argue that there is no reason why the department rule should not be treated as an extension of the statute because the department is merely carrying out the legislature's will. The *Ward* court examined the differences between the statute and the administrative interpretation when it concluded otherwise:

> Analysis of the policy underlying RCW 18.27 further erodes [the contractor's] position. First, the express purpose of the statute is "to afford protection to the public . . . from unreliable, fraudulent, financially irresponsible, or incompetent contractors." RCW 18.27.140. The act is clearly remedial in nature. It represents an attempt to expand the relief available to victims. On the other hand, the Department's scheme requires a plaintiff to undergo the expense and delay of a superior court suit without regard to the amount in controversy or how solvent the contractor may be, in order to preserve a remedy the need for which may never arise. Such an interpretation is not only irreconcilable with the statute's purpose, but also contrary to the principles of judicial economy which [the contractor] urge[s] as its chief recommendation.

Id. at 378.

Although the administrative rules have obviously undergone some changes in the

20 years since *Ward* was published, a review of the current rules and those examined by the *Ward* court proves the continued validity of that court's observations. *See* former chapter 296-200 WAC; chapter 296-200A WAC.

The Ibsens argue that "bond" and "security" are used interchangeably in the statute and mean the same thing. Again, *Ward* is helpful:

> RCW 18.27.040([8]) permits a contractor to file with the Department a "deposit" of "cash or other security" in lieu of a bond. RCW 18.27.040([9]) permits a judgment holder to "execute upon the security held by the Department." The Department is then directed to "pay or order paid from the deposit . . ." RCW 18.27.040([11]) authorizes rules for the "proper administration of the security."
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> Throughout the statute, "bond" is consistently differentiated from "security", with the latter term used to refer collectively to the alternative to a bond. In RCW 18.27.040([9]), the term "security" appears to be used synonymously with "deposit." The significance of this becomes clear when the practical aspects of the Department's obligations are considered.
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> The "deposit" may be cash or any number of unspecified things so long as it is "acceptable to the Department." RCW 18.27.040([8]). The drafters recognized the need for rules governing the handling of such security but were unable to authorize the same with specificity since they could not anticipate what "other security" might be acceptable. Hence, RCW 18.27.040([11]) was adopted.
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> Bonds, on the other hand, are a widely used, specific type of security. The Department's responsibilities under the act with respect to bonds are limited.

Ward, 47 Wn. App. at 376-77.

The *Ward* court's reasoning is sound.

We note that the purpose of the contractor registration act is to "afford protection

to the public including *all persons*, firms, and corporations *furnishing labor, materials, or equipment to a contractor from unreliable*, fraudulent, *financially irresponsible*, or incompetent *contractors*." RCW 18.27.140 (emphasis added). The statute is plainly not intended to limit its protection to judgment creditors.

RCW 18.27.040(4) is not ambiguous in the context before this court. The agency's interpretation is afforded no deference. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 54, 26 P.3d 241 (2001). The statute does not require the claimant to obtain a judgment. It merely requires that "*claims* shall be satisfied from the bond" should "the actions commenced and pending at any one time exceed the amount of the bond then unimpaired." RCW 18.27.040(4) (emphasis added).

Our interpretation is supported by *Cook v. National Indemnity Co.*, 47 Wn. App. 110, 733 P.2d 1002 (1987), which both parties cite. In *Cook*, a homeowner's suit for breach of contract was stayed when the contractor filed for bankruptcy. The trial court disbursed bond proceeds to materialmen and equipment suppliers who had obtained final judgments before the homeowner had obtained one. The homeowner appealed. The appellate court held that the disbursement to the lower tier creditors was premature. The court expressly rejected the subcontractor's argument that a claimant gains priority to bond proceeds only by reducing his claim to a judgment first, or that a judgment is even needed to be entitled to payment under the bond. *Cook*, 47 Wn. App. at 113-14.

Both the Qafokus and the Kelsers sought equitable relief in their complaints. The trial court granted that relief in its pro rata distribution of the bond. *State ex rel. Nat'l Bank of Commerce v. Stacy*, 198 Wash. 708, 712, 90 P.2d 264 (1939); *Michelson Bros., Inc. v. Baderman*, 4 Wn. App. 625, 627-28, 483 P.2d 859 (1971). Nothing in the statute prevents this result. Instead, the statutory purpose—protection of all persons within the priority structure—is served *only* by this result. The bond is $12,000. It would not serve the purpose of the statute to require these creditors—who proved their claims to a judge—to pay for counsel to seek a stay from the bankruptcy court and then obtain a judgment for the right to share in a three-way division of $12,000 in satisfaction of the principal judgment, costs, and attorney fees.

Citing only to court rules, the Qafokus and the Kelsers claim they are entitled to their attorney fees and costs on appeal. *See* RAP 18.1 (procedure for requesting fees); RAP 14.3 (allowable costs); CR 11 (sanctions). "A party may recover attorney fees and costs on appeal when granted by applicable law." *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001); RAP 18.1. The Qafokus and the Kelsers do not set forth argument or the underlying grounds for the grant of fees as required by RAP 18.1(b). The procedure outlined in RAP 18.1(b) is mandatory. *Pruitt v. Douglas County*, 116 Wn. App. 547, 560-61, 66 P.3d 1111 (2003). The rule requires more effort than a bald request. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996).

The party is required to submit argument and citation to authority. *Id.* at 704. The Qafokus and the Kelsers have not brought forth sufficient grounds, if any exist, for attorney fees. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). Their request is denied.

CONCLUSION

The trial court did not err. RCW 18.27.040 does not require that claims be reduced to judgment to qualify for payment under the priority statute. The administrative rules concerning a security in lieu of a bond do not apply to the judicial resolution of claims under RCW 18.27.040. We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, A.C.J.

WE CONCUR:

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Brown, J.

Kulik, J.